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CHARLES ELMORE CROPLE

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IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No. 814

MANHATTAN RAILWAY COMPANY and CHARLES FRANKLIN,
Petitioners,

v.

THE CITY OF NEW YORK, THEODORE S. WATSON, and others as a Committee for 7% Guaranteed Stock of Manhattan Railway Company; HAROLD PALMER, and others, as a Committee for 7% Guaranteed Stock of Manhattan Railway Company, and CHARLES FRANKLIN, and others, as Committee for Modified Stock of Manhattan Railway Company, and CHEMICAL BANK & TRUST COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN B. DOYLE,
Attorney for Manhattan Railway Company and Charles Franklin, Petitioners.

FREDERIC A. JOHNSON,
of Counsel.

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In the

Supreme Court of the United States

October Term 1945

No.

Manhattan Railway Company and Charles Franklin,

Petitioners,

v.

The City of New York, Theodore S. Watson, and others as a Committee for 7% Guaranteed Stock of Manhattan Railway Company; Harold Palmer, and others, as a Committee for 7% Guaranteed Stock of Manhattan Railway Company, and Charles Franklin, and others, as Committee for Modified Stock of Manhattan Railway Company, and Chemical Bank & Trust Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States:

Your petitioners respectfully submit their petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit in the above cause.

Jurisdiction

The decree of the Circuit sought to be reviewed was entered on December 31, 1945. The jurisdiction of this

Court is invoked under Section 240-a of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938).

The opinion of the Circuit Court of Appeals for the Second Circuit was filed December 31, 1945.

Opinions Below

The opinion of the Circuit Court of Appeals has not been reported and is printed as an appendix to the certified Record. The opinion of the District Court is in this Record (R. 284-291).

Entry of orders for distribution of funds, on mandate, is withheld pending this application.

Questions Presented

The fundamental question presented by this petition is whether a federal district court in an equity receivership has the power to entertain the application of an attorney, who has theretofore been duly retained therein by the board of directors of a corporation, to enforce an equitable lien against the fund which he recovered pursuant to his retainer for the benefit of all stockholders of that corporation.

A related question is whether petitioners may enforce through the same petition in equity a lien of attorney or solicitor alleged to have arisen by virtue of Sections 474 and 475 of the Judiciary Law of the State of New York.

As particularly applied to the equitable jurisdiction of the federal district courts, the question is whether power therein exists to allow petitioner Franklin an award "as between solicitor and client" for services rendered by him in recovering a fund for the stockholders.

As particularly applied to Sections 474 and 475 of the Judiciary Law of the State of New York, the question is whether the statutory lien thereby provided for is available to petitioner Franklin in this proceeding to enforce

an award out of the fund obtained through his professional services rendered for the ultimate benefit of the stockholders.

Summary Statement of the Matter Involved

The essential facts are contained in the subsequently cited folios of the certified Record, the affidavits of petitioner Franklin therein, the opinions of the courts below in the instant proceeding and in passages, hereinafter referred to specifically, from the numerous opinions set forth in the Record (R. 26, 27, 288), or from opinions which are closely related to this litigation.

This Court is asked to review the determination of the Circuit Court of Appeals which denies to petitioner, Charles Franklin, the right to enforce an attorney's lien either under the aforesaid equitable principles or in accordance with the above mentioned provisions of the state statutes. The relevant portions of the New York Judiciary Law are:

> "Sec. 474. Compensation of attorney or counsellor.
>
> The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law, * * *".

> "Sec. 475. Attorney's lien in action, special or other proceeding.
>
> From the commencement of an action, special or other proceeding in any court or before any state or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after

judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien. As amended L. 1936, c. 876; L. 1938, c. 34, eff. Sept. 1, 1938."

Petitioner Franklin's claim to recover compensation for his professional services as a *contract* obligation owed to him by The City of New York, one of the respondents herein, was not upheld (*Franklin et al.* v. *City of New York, et al.*, 144 F. 2d 571, C. C. A. 2d; certiorari denied, 324 U. S. 847).

It was upon a cross motion made by said respondent in opposition to the instant application of petitioners to impress a lien upon the fund in question that the order of dismissal was entered by the District Court in this proceeding (R. 285-291).

Petitioner Franklin, however, relies for his right to enforce his equitable and statutory liens upon his retainer by the board of directors of the petitioned Manhattan Railway Company. He also relies upon the agreement, dated August 7, 1939, which he entered into with the Manhattan's Modified Stock Committee; particularly, for his right to enforce the statutory lien. He was elected by the board of directors of Manhattan on November 11, 1932, to serve as the general counsel for the Company (R. 14). On January 30, 1933, by court order, he became its solicitor (R. 15, 146). By a subsequent vote of the board of directors on February 8, 1934, his compensation as general counsel was fixed at $15,000 per year, retroactive to November 11, 1932, the date of his appointment as such counsel (R. 14-15, 97-99). Through this subsequent vote and the resolution thereby adopted by the board of directors on February 8, 1934, with reference to petitioner Franklin's annual compensation of $15,000, it was declared in an added proviso that this "is not intended to cover the special services rendered by him, such as representing the Manhattan Railway Company in the

courts, and in conferences respecting unification, for which reasonable compensation will be paid" (98).

On June 17, 1938, the Company through its board of directors entered into an agreement with petitioner Franklin (R. 100-105) whereby he was to receive a minimum of $250,000 payable to him as "counsel out of any funds or property which it may receive for itself or for or on account of its stockholders, including any property or funds which it may receive from or in respect to claims or rights against the Interborough Rapid Transit Company or its Receiver or the City of New York" (R. 102, 103).

On August 7, 1939, the Manhattan's Modified Stock Committee made an agreement with petitioner Franklin, as stated previously, to assume the legal expenses out of any cash, stock or other property received under the proposed Plan of Unification with the City of New York, including the obligation in the foregoing agreement of June 17, 1938 (R. 154, 155). This was the protective committee for the Modified 5% Stock of the Manhattan Railway Company (R. 50, 154). These shares formed one of the two classes which made up the stock of the Company (R. 50, 205). The other consisted of the Unmodified 7% Stock, whose protective committees raised no objection to a further allowance to petitioner Franklin; the Chairman and Vice Chairman of one thereof testifying as individuals prior to the instant proceeding that they thought the allowance sought by him should be granted (R. 50, 51). The respective solicitors for these committees have also approved this claim (R. 273).

It was owing to the efforts of petitioner Franklin between 1932 and the consummation of the Plan of Unification in 1940 that the interests of the stockholders of the Manhattan Railway Company were not eliminated. The danger of this elimination was twofold. On the one hand, the Interborough Rapid Transit Company attempted to

destroy the value of the stock by proceeding to disaffirm the lease which it held on the lines of the Manhattan Railway Company. On the other hand, the Protective Committee for the First Consolidated Mortgage Bonds of Manhattan desired to wipe out the stock of this Company through foreclosure. It is the expressed opinion of competent authority that petitioner Franklin saved the interests of the stockholders from both of these attacks (R. 175-181).

The Interborough Rapid Transit Company was placed under an equity receivership on August 26, 1932, as a result of a friendly suit instituted by the American Brake Company (See *Johnson* v. *Manhattan Ry. Co.*, 61 F. 2d 934, at 939, C. C. A. 2d). This receivership was promptly extended to Manhattan (*ibid.*). After protracted litigation and a settlement, in both of which petitioner Franklin participated actively throughout, the effort of Interborough to disaffirm the lease from Manhattan was defeated (*Murray* v. *Roberts,* 103 F. 2d, 889, C. C. A. 2d; certiorari dismissed by virtue of Rule 35 [311 U. S. 720]). The Interborough in 1913 had leased the elevated lines constituting the entire assets of the Manhattan Company, to integrate them in a vast extension of its subway system (*City of New York* v. *Interborough R. T. Co.*, 257 N. Y. 20; *Murray* v. *Roberts,* 103 F. 2d, *supra,* 895, 896, C. C. A. 2d).

In the years following the First World War, this lease turned from a source of profit into one of loss (*Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 200). Interborough then desired to rid itself of the lease. Obviously, the attempt, if successful, would have destroyed whatever diminished value the stock of Manhattan retained at that time (R. 175, 176). The preservation of the stock interest through the professional labors of petitioner Franklin yielded ultimately $18.00 per share, to the holders of 556,490 shares of the Modified 5% Stock and approximately $31.50 per share, to the holders of 43,150 shares of the Unmodified 7% Stock (R. 176), a realization of

$11,376,045. It is thus apparent why the responsible stockholders' committeemen and solicitors have favored petitioner's claim for compensation.

A less vigilant or skillful attorney might also have permitted the sacrifice or the subordination in the interim of the interests of the stockholders to the claims of the bondholders of Manhattan in accordance with the general rule for such priority. Litigation on this question, raising most complex issues, reached the Circuit Court of Appeals for the Second Circuit, and led to a decision that the stockholders of Manhattan had a direct interest in the properties of the Interborough under the lease between the two companies (*American Brake Shoe & F. Co.* v. *Interborough R. T. Co.*, 122 F. 2d 454, 459-461, C. C. A. 2d).

There are at present two existing reserve funds established by the stockholders of the Manhattan Railway Company to pay legal compensation on behalf of said Company. A balance of these reserves approximating $500,000 is on deposit with the Chemical Bank & Trust Company (R. 11). Upon this petition, no review is sought of any rulings unless they pertain to the denial of a right in petitioners to impress a lien upon funds allocated to the Manhattan stockholders.

Petitioner Franklin claims $90,000 for services as general counsel. This amount is arrived at upon the basis of said petitioner's services for 7½ years at $15,000, less $22,500, previously received under an order of the late Judge Mack, who for a period of years prior to his final illness had the receivership proceedings before him (R. 16, 17; See *American Brake Shoe & F. Co.* v. *Interborough R. T.*, 10 F. Supp. 512). In addition, petitioner claims $225,000 for services as Manhattan's solicitor in the receivership and related proceedings (R. 17).

In the prior proceeding wherein petitioner Franklin attempted unsuccessfully to establish a contractual obliga-

tion against the City of New York (*Franklin et al.* v. *City of New York et al.*, 144 F. 2d 571, C. C. A. 2; certiorari denied, 324 U. S. 847), Judge Patterson made an allowance of $20,000 instead of the $345,000 claimed (R. 18, 19). Although the Circuit Court of Appeals modified this order by adding $15,000 for general counsel services, it adopted the theory that "allowances must be made in accordance with the principle which controls the allowance of counsel fees in receivership cases, namely, benefit to the receivership estate" (R. 18, 19).

In the instant proceeding, as its opinion shows, the Circuit Court has maintained the view that petitioners are adhering to a theory of the existence of a contract obligation on the part of the City. The gist of the opinion follows:

> "Legal fees in the receivership are governed not by any general equitable principles, but by the Plan itself; and our earlier interpretation of its terms is final. The claims themselves being barred, the assertion of a lien as security for their collection must obviously fail" (R. p. 104).

But the Court's earlier interpretation dealt only with an alleged contractual obligation of the City under the Plan. The present petition (R. 11-59) is to charge the stockholders who were benefited upon equitable principles and under state statute, and regardless of the Plan; a claim neither raised nor decided in the earlier proceeding.

Reasons Relied on for Allowance of the Writ

1. The denial of the applicability of general equitable principles to sustain recovery by an attorney of compensation out of a fund obtained by his professional services for the benefit of stockholders of a corporation, whose board of directors duly retained him to accomplish this result, is in conflict with the opinion of this Court in *Sprague* v. *Ticonic National Bank*, 307 U. S. 161.

The Circuit Court of Appeals was under a misapprehension as to the nature of this application, since the opinion asserts that "petitioners seek in substance to obtain further allowances from the City of New York for the legal services of petitioner Franklin". On the contrary, as the summary statement hereinabove shows, the allowances are sought out of a segregated fund recovered on behalf of stockholders.

2. The denial to petitioner Charles Franklin of the right to enforce a lien provided for by applicable state statute is contrary to the principle accepted by this Court in *Central Railroad* v. *Pettus,* 113 U. S. 116.

It is further an anamoly, as the interpretation placed upon this statute in a bankruptcy proceeding by the Federal Court for the Southern District of New York, provides for the lien on the claim and the fund allocated to the payment thereof, and not on the general assets of the estate (*In re McCrory Stores Corporation,* 19 F. Supp. 681).

WHEREFORE, your petitioners, respectfully pray that a writ of certiorari issue under the seal of this Court to review the decree of the Circuit Court of Appeals for the Second Circuit in the above cause, and that said decree be reversed.

New York, February 4, 1946.

Respectfully submitted,

JOHN B. DOYLE,
Attorney for Petitioners, Mantantan Railway Company and Charles Franklin.

FREDERIC A. JOHNSON,
of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1945

No.

MANHATTAN RAILWAY COMPANY and CHARLES FRANKLIN,
Petitioners,

against

THE CITY OF NEW YORK, *et al.*,
Respondents.

BRIEF IN SUPPORT OF PETITION

Statement of the Case

A summary statement of the facts is given in the petition (pp. 3-8 above).

Specification of Errors

It is submitted that the Court below erred:

1. In disregarding the question, raised by the summary dismissal of the first cause of action, whether the lien of petitioner Franklin attached to the fund recovered for the stockholders, regardless of the absence of any allegation that this recovery or the services performed in effecting it were of benefit to the receivership estate.

2. In overruling the contention that the general principle of equity upheld by this Court in *Sprague* v. *Ticonic Bank*, 307 U. S. 161 applied to the first cause of action.

3. In overruling the contention that the statutory lien provided for by state law sustained the first cause of action.

The question whether there could be any recovery under general principles of equity for professional services, not of benefit to the estate receivership estate which had been rendered to a group of stockholders in obtaining an award for them through the receivership proceedings, has not been answered in any of the numerous prior proceedings connected with this receivership, and still remains unanswered as a result of the opinion herein sought to be reviewed, and would seem not to have been answered by this Court.

The question whether there could be a lien on the share of certain stockholders in the entire group who consented to be represented by the committee retaining the attorney who rendered the services, was expressly left unanswered by the Circuit Court of Appeals for the Second Circuit in *Palmer* v. *Watson,* 122 F. (2d) 598, C. C. A. 2d.

As an outcome of the summary dismissal of the first cause of action herein upon the cross motion of the City of New York, the legal sufficiency of the allegations of the claim of petitioners to a lien upon the fund recovered for the benefit of stockholders, is involved. Both the Circuit Court and the District Court disposed of the first cause of action, in sustaining the cross motion of the City of New York for the dismissal thereof, without reference to the plea of *res judicata* based upon *Franklin et al.* v. *City of New York,* 144 F. 2d 571, C. C. A. 2d, certiorari denied, 324 U. S. 847, as set forth in the answer of the Committee for Manhattan's Guaranteed 7% Stock (R. 121, 127-135), or to the ground of *res judicata,* contained in the cross notice of motion of the City of New York (R. 239-241), except in so far as said ground for the cross motion was deemed to bar the present application upon the theory that all of its allegations were dependent upon

the existence of a contract right under the Plan of Unification.

The defense of *res judicata* will in no event be of avail to dispose of the first cause of action, because, as will hereinafter be shown, the statutory lien depends upon the adjudication made heretofore by the Circuit Court of Appeals for the Second Circuit that the fund was recovered on behalf of the stockholders of Manhattan upon the ground that they were creditors of Interborough.

ARGUMENT

POINT I

The opinion of the Circuit Court of Appeals disregards the equitable principle supporting the contention of petitioner Franklin that power resides in the District Court to enforce a lien on his behalf against the fund recovered through his efforts.

In *Sprague* v. *Ticonic Bank*, 307 U. S. 161, petitioner through suit in the Federal District Court brought on her own behalf and at her own expense, had vindicated her claim to a lien on the proceeds of earmarked bonds to the amount of her trust funds in the hands of the receiver of two insolvent banks. Petitioner alleged that by thus vindicating her claim she had established as matter of law the right of recovery in relation to numerous trusts in situations like her own. She, therefore, prayed the District Court for reasonable counsel fees and litigation expenses to be paid out of the proceeds of the bonds.

The petition was denied in the District Court as well as in the Circuit Court of Appeals upon the ground that the award of such costs was beyond the power of the District Court. This Court granted certiorari. In re-

versing, it held that the power did exist to make "such award, as between solicitor and client".

The growth of this jurisdiction of Chancery to make an award in favor of one litigant as against another originated from the analogous right of the solicitor to be allowed all his costs and expenses (in *Lomax* v. *Hide*, 2 Vern. 185 [1690]).

Chancery did not overlook the source of the principle after its continued application for more than a century. In *Dungey* v. *Angove*, 2 Ves. Jun. 304 (1794), the plaintiff tenant filed a bill of interpleader against his landlord, the defendant Angove, on notice of ejectment by a stranger under a title adverse to that of the landlord. From the nature of the suit, the Lord Chancellor suspected collusion and directed an inquiry. The ensuing report confirmed the fraud. Upon dismissal of the bill, "the plaintiff and his solicitor were ordered to pay all the expenses of the defendant Angove as between attorney and client * * *" 2 Ves. Jun. 304, at 313; 30 Eng. Rep. 644 at 649.

The uniform administration of equity exacts protection for an attorney or solicitor, in the absence of a retainer, through an award "as between solicitor and client" in instances where he had obtained a benefit for a party; when, under like circumstances, he might have been subjected to a proceeding for the purpose of recovering such an award against himself for causing loss to this same party.

Sprague v. *Ticonic Bank*, 307 U. S. *supra*, at 165, portrays the relevancy of eighteenth century English practice in contemporary equity suits. Although "a bankruptcy proceeding is not itself a suit in equity either by statutory definition or in common understanding" (*Columbia Gas Co.* v. *Amer. Fuel Co.*, 322 U. S. 379, 383), a court of bankruptcy "is guided by equitable doctrines and principles" (*Securities Comm.* v. *U. S. Realty Co.*, 310 U. S. 434, 455). A Federal District Court in matters arising out of an

equity receivership, instead of bankruptcy, does not have to modify or suspend these postulates to avoid inconsistency with the Chandler Act (*ibid*). Especially, does the role of the Chancellor provide the source of authority for the Federal Courts in exercising jurisdiction over these receiverships, as their jurisdiction owes its birth to the persistent vitality of equity, independently of statute, to supply new remedies (Finletter, The Law of Bankruptcy Reorganization, 5 ff; Dean, A. Review of the Law of Corporate Reorganizations, 26 Columbia Law Quarterly, 537). Since precedents in equity assumed binding effect in the period of Lord Eldon (Pound, The Decadence of Equity, 5 Columbia Law Review, 20, 25) its historic milestones must be heeded.

As the attempt to harmonize the subject of costs in the Federal courts was not made until 1853 (Street, Federal Equity Practice, § 1987) and the foundation of their power to prescribe costs in equity was not ultimately settled until the adoption in 1878 of §§ 917 and 918 of the Revised Statutes (Street, *supra,* § 1988) this legislation follows the era of the crystallization of equity (Pound, 5 Columbia Law Review, *supra,* at 25). Consequently, the operation of the rules and orders carrying out this legislation must apply equally from the standpoint of equity jurisprudence as well as from the norm of the due process clause of the Fifth Amendment to prevent discriminatory effect in a particular situation (see *Currin* v. *Wallace,* 306 U. S. 1, 14; cf. *Norwood* v. *Baker,* 172 U. S. 269, as explained in *French* v. *Barber Asphalt Paving Co.,* 181 U. S. 324, 344, 345).

In the instant case, petitioner Franklin might have advised the board of directors of the Manhattan Railway Company to proceed to eliminate the interests of its stockholders. His role as such adviser would probably have been particularly facile as the prospects of Unification and the approaching end of the receivership became in-

creasingly definite. At that period, *Case* v. *Los Angeles Lumber Co.,* 308 U. S. 106, had recently emphasized the necessity for subordination of stockholders to bondholders in corporate reorganization in accordance with the opinion in *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482.

This aspect of the position of the Manhattan stockholders was definitively argued in 1941 before the Circuit Court of Appeals for the Second Circuit in *American Brake Shoe & F. Co.* v. *Interborough R. T. Co.,* 122 Fed. 2d 454, C. C. A. 2d, wherein Judge Patterson's order in the District Court upholding the Plan of Unification was affirmed.

In answer to the contention of Manheim, a holder of Manhattan Second Mortgage bonds, that the Manhattan shareholders should not participate, Judge Swan asserted in part (122 F. 2d at 459-460, C. C. A. 2d):

> "There remains to be considered the matter of the participation of Manhattan shareholders. In the Settlement Fund order they were alloted nearly $10,000,000, while the Second Mortgage bonds were allotted only about $1,800,000 and have not been paid in full. Manheim contends this is invalid under *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106, 60 S. Ct. 1, 84 L. Ed. 110. Had Manhattan assets been used to pay the shareholders instead of creditors the contention would be sound, but it must be remembered that Interborough's guaranty endorsed on the Manhattan stock certificates gave the stockholders a direct contract claim against Interborough. *Peabody* v. *Interborough R. T. Co.,* 212 App. Div. 502, 209 N. Y. S. 380; *Pennsylvania Steel Co.* v. *New York City R. Co.,* 2 Cir., 198 F. 721, 761. As such the compromise establishing their participation in the Settlement Fund was made between them and Interborough and not as participants in Manhattan assets. Consequently the Manhattan stockholders did not receive anything as stockholders, but rather as general creditors of Interborough—a position the same as the Manhattan Second Mortgage bondholders, who them-

selves were participating only as general creditors of Interborough—all Manhattan physical assets having been exhausted by the Manhattan Consolidated Mortgage prior lien."

The remaining paragraph devoted by Judge Swan to this discussion relates principally to the immunity of this compromise agreement from attack by the Second Mortgage Bondholders.

Hence, as the allegations of the first cause of action must be deemed true upon its summary dismissal herein, this opinion of Judge Swan furnishes adequate proof of the asserted success of petitioner in safeguarding the interests of the Manhattan stockholders as against their subordination to the bondholders.

Petitioner has been proven equally successful in his efforts to prevent the disaffirmance or modification of the terms of the lease of Manhattan to the Interborough. Thus, Judge Patterson in the course of his opinion approving the Plan of Unification said [*American Brake Shoe & F. Co.* v. *Interborough R. T. Co., Record on Appeal* (ff. 1198 at 1201, 1202)]:

> "In 1939 this court granted the application to disaffirm as to the lines leased from the Manhattan, but denied the application so far as it related to operation of the elevated extensions. In April 1939 the Circuit Court of Appeals reversed the decision. *Murray* v. *Roberts,* 103 F. 2d, 889 (C. C. A. 2). It was held that the Interborough could not get rid of an obligation to the City to operate the third tracks and extensions on the Manhattan property, and in effect that the receiver could not reject the Manhattan lease without consent of the City. The City's position on the issue had been that the Interborough receiver should not cease operation of the Manhattan system but that the terms of the lease were too onerous. From this decision there is now pending a petition for certiorari to the Supreme Court. Prosecution of the petition for certiorari and all other proceedings relative to the effect of fran-

chises on operating responsibilities and priorities of claimants have been held in abeyance for some months while a plan and agreement looking toward complete acquisition of the properties by the City has been in the course of negotiation and fulfillment."

Doubtless, as a part of this negotiation, after all of the properties subject thereto had been transferred to the City of New York, a stipulation was signed for the dismissal of the petitioners for certiorari in *Murray* v. *Roberts* (311 U. S. 720).

The contemporary relevancy of eighteenth-century English practice in respect of costs and allowances, as explained in *Sprague* v. *Ticonic Bank, supra,* makes unquestionable the power of the Federal District Court to pass upon the good faith of petitioner Franklin, in case he had induced the Manhattan Railway Company to take a position adverse to the claims of its stockholders, and they had been forced to retain counsel on their own behalf to obtain the funds in controversy. Proof of fraud or of bad faith would then have entitled them to an award "as between solicitor and client" against either Manhattan or Franklin or both (*Dungey* v. *Angove, supra*).

Sprague v. *Ticonic Bank, supra,* as we have seen, upholds the power of the Federal District Court to allow a single Manhattan stockholder who might have retained petitioner Franklin to perform the services actually rendered, to have charged upon the fund recovered the whole amount charged to him by Franklin, including the latter's fee as counsel.

With this equitable principle thoroughly established, petitioner Franklin has a right to enforce his claim for professional services upon the fund, which came into being through his professional labors under his retainer with the Manhattan Railway Company. Its board of directors and one of the two stockholders' protective committees are officially on record in support of his claim. The responsi-

ble heads of the other committee are individually on record to the same effect. As the authorities, which are herein relied upon, show, the award "as between solicitor and client" does not depend upon an express contract. To deprive petitioner Franklin of the hearing which he seeks in this proceeding to enable him to prove the value of his services, would be to deny a property interest to him through a discriminatory construction of federal equity jurisdiction and of the rule making power exercised by the Federal Courts pursuant to §§ 917 and 918 of the Revised Statutes. This result follows, since the basis of the doctrine invoked for an award "as between solicitor and client" is petitioner Franklin's right to a recovery of the value of the effort or expense caused by the litigation which was brought for the establishment of the fund. The Federal District Court, therefore, has and must exercise the power to enforce petitioner Franklin's equitable lien upon this fund. As this issue was not raised or brought to the attention of the courts in any way in *Franklin* v. *City of New York,* 144 F. 2, 57, C. C. A. 2d; certiorari denied, 324 U. S. 847, or by any prior proceeding, the present application is not barred (*Sprague* v. *Ticonic Bank,* 307 U. S., *supra,* 168 and note, explaining *Kansas City Southern Ry. Co.* v. *Guardian Trust Co.,* 281 U. S. 1).

The Circuit Court of Appeals took the position erroneously that petitioners herein were attempting in their first cause of action to enforce their equitable liens upon the premise of the assumption by the City of New York, under the Plan of Unification of the contractual obligation created by the retainer of petitioner Franklin by petitioner Manhattan. The erroneous nature of this position is illustrated by the affirmance of the order of dismissal entered in the District Court upon the cross motion of the City of New York. The first cause of action is not brought to obtain further allowances from the City of New York. Its sole object is to impress a lien upon funds established for the benefit of stockholders by petitioner Franklin.

POINT II

The fund in controversy was recovered on behalf of the stockholders of the Manhattan Railway Company, who have been adjudged general creditors under the Plan of Unification.

As the Protective Committee for the holders of the Modified Guaranteed 5% Stock of the Manhattan Railway Company retained petitioner Franklin and agreed to compensate him for his services in effecting this recovery, he has the right to apply directly, without any intervention by said stockholders or their representatives, for payment out of the fund. Under the law of the State of New York, his right to enforce a statutory lien arises from the absence of an express contract authorizing recovery of payment thereunder.

The stockholders of Manhattan had a direct contract claim against Interborough (*American Brake Shoe & F. Co.* v. *Interborough R. T. Co.*, 122 Fed. 454 at 460, C. C. A. 2d; see quotation thereof under Point I, herein, *supra* (pp. 15-16). In concluding the second paragraph of that discussion, previously referred to herein without quotation (*ibid*), Swan, J., declared (122 F. (2d) *supra* at 460):

> "As the settlement was made by Interborough to dispose of the stockholder claims it is very doubtful whether any infirmity in the stockholders' legal position could benefit the Manhattan Second Mortgage bondholders. More important, however, is the fact that the settlement order, the validity of which we have already sustained, established by compromise the legal rights of the Manhattan stockholders to share as creditors, so that now their status as such cannot be questioned. As participation of Manhattan stockholders was in the capacity of general creditors of Interborough, a status not inferior to the Manhattan Second Mortgage bonds, it cannot be attacked by Manheim as a holder of such bonds."

The principle elucidated in *Ticonic Bank* v. *Sprague, supra,* to allow recovery of an award "as between solicitor and client" to one who sued for the benefit of a trust estate, was recognized in *Trustees* v. *Greenough,* 105 U. S. 527. It was stated therein (*supra,* 533), as quoted by this Court in *Central Railroad* v. *Pettus,* 113 U. S. 116, 123, that "the same rule is applicable to a creditor's suit where a fund has been realized by the diligence of the plaintiff."

In *Central Railroad* v. *Pettus,* the Court stated further (p. 123):

> "We have seen that the purchase, by the Western Railroad Company of the property of the Montgomery and West Point Railroad Company, and the surrender by the latter of its charter, left the unsecured creditors of the vendor company unprovided for, except as the vendee company assumed and agreed to meet the outstanding debts and obligations of the other company. But when the present appellants became purchasers at the sale in the suit instituted by Morris and Lowery, trustees, they asserted their right to hold the property, originally belonging to the Montgomery and West Point Railroad Company, freed from any claim against it by the unsecured creditors of that company. Those creditors resided in several States, and their claims aggregated a large amount. Co-operation among them was impracticable. If some did not move, the interests of all would have suffered. Hence Branch, Sons & Co. and their co-complainants instituted suit for the benefit of themselves and other creditors of the same class. They, and their solicitors, bore the entire burden of the litigation until the lien was finally declared, and the property ordered to be sold to pay all claims filed pursuant to the decree."

These circumstances furnish a close parallel to those existing in August 1939 in relation to the precarious position of the Manhattan stockholders. The claim of the right of Interborough to disaffirm the 1913 lease, and the contention of the Manhattan bondholders to priority over

the stockholders, still awaited definitive adjudication. Judicial notice may be taken of the wide distribution of a large volume of Manhattan stock throughout the United States. Although the City of New York in acquiring the properties under the Plan of Unification did not dispute the stockholders' rights, such rights, as we have explained, would have been previously extinguished without petitioner's positive aid, as alleged herein under the first cause of action.

Under these circumstances, the following paragraph of the opinion in *Central Railroad* v. *Pettus, supra,* is peculiarly apposite (113 U. S. at 124-125):

> "It is clear that within the principles announced in *Trustees* v. *Greenough,* Branch, Sons & Co. and their co-complainants are entitled to be allowed, out of the property thus brought under the control of the court, for all expenses properly incurred in the preparation and conduct of the suit, including such reasonable attorney's fees as were fairly earned in effecting the result indicated by the final decree. And when an allowance to the complainant is proper on account of solicitors' fees, it may be made directly to the solicitors themselves, without any application by their immediate client."

It is thus plain that the Circuit Court of Appeals misapprehended the purpose of the instant application in purporting to dispose of it upon the ground announced in the prior application "that allowance of counsel fees is controlled by the benefit brought to the receivership estate."

In the instant proceeding, the first cause of action is based upon sections 474 and 475 of the Judiciary Law of the State of New York. In the closely related field of bankruptcy, it was held by Judge Patterson in the Southern District of New York, in a proceeding emanating from the reorganization in the case of *In re McCrory Stores Corporation* (1937), 19 F. Supp. 691, 694:

> "In bankruptcy the attorney for a creditor does not acquire a lien on the filing of the bankruptcy petition, and he certainly does not at any time have a lien on the general assets of the estate. So far as he and his lien are concerned, the 'commencement' of the action or proceeding referred to in the New York statute providing for an attorney's lien is the filing of the proof of claim, and the lien is only on the claim and later on the fund allocated to payment of the claim. In fact, the action or proceeding in the sense of the statute is not the bankruptcy proceeding as a whole, but is the proceeding initiated by the filing of the proof of claim."

Through this interpretation of the New York statute, the force of *Central Railroad* v. *Pettus, supra,* gains strength from the additional circumstances occurring therein that after the decree in the original litigation, commenced and prosecuted wholly in the state courts of Alabama, the defendant corporations bought up the claims of unsecured creditors, including those of the complainants. As to that factual situation, this Court declared (113 U. S., *supra,* 127-128):

> "The lien of the solicitor rests, by the law of that state, upon the basis that he is to be regarded as an assignee of the judgment or decree, to the extent of his fees, from the date of its rendition. This right of the solicitors is superior to any which the defendant corporations acquired, subsequent to the decree, by the purchase of the claims of unsecured creditors."

The first cause of action in the instant proceeding, therefore, seeks to enforce a lien, both equitable and statutory. Under the statute this lien had its inception at the commencement of the proceeding to enforce the claim (*In re McCrory Stores Corporation,* 19 F. Supp. 691) and subsequently attached to the fund recovered as a result of the aforesaid proceeding (*ibid*). This lien upon the fund allo-

cated to the claim is superior to the right of the holder of the claim (*ibid*) or to a purchaser from him (*Central Railroad* v. *Pettus*, 113 U. S., *supra*, at 127-128) and may be made directly to the attorney without any application by the client (113 U. S., *supra*, at 124-125).

In cases decided by the state courts of New York where the existence of the right to a common law possessory lien was at issue, it has been held that its non-existence was a condition precedent to an action by its putative possessor for recovery of a personal judgment (*Shoyer* v. *Wright-Ginsberg Co.*, 240 N. Y. 223, 233; *Newburger-Morris Co.* v. *Talcott*, 219 N. Y. 505, 511). By parity of reasoning, the New York Court of Appeals might hold that the right of an attorney to recover under an implied contract, as is provided for by section 474 of the Judiciary Law, and to enforce the correlative right to a lien under section 475 of this Law, would necessarily be available to petitioner Franklin when the effort to establish an express contract right against the City of New York has proved fruitless in the federal courts. As the opinion herein sought to be reviewed has avowedly made the allowances hitherto granted to petitioner, Franklin, solely upon the ground of benefit to the estate, the instant petition rests upon the theory of recovery for the independent benefits received by the stockholders. For this reason, petitioner Franklin has set forth facts sufficient to recover under the doctrine of money had and received to prevent unjust enrichment in accordance with New York law (*Schank* v. *Schuchman*, 212 N. Y. 352, 358; cf. *Thompson* v. *Magnolia Petroleum Company*, 309 U. S. 478). Federal authority permits analogous relief in a bankruptcy reorganization without the necessity for resort to the state tribunals (*In re McCrory Stores Corporation*, 19 Fed. Supp. 691).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated, New York, February 4, 1946.

Respectfully submitted,

JOHN B. DOYLE,
Counsel for Manhattan Railway Company and Charles Franklin, Petitioners.

FREDERIC A. JOHNSON,
of Counsel.

FEB 16 1946
CHARLES ELMORE CROPLEY
CLERK

(31133)

Supreme Court of the United States

OCTOBER TERM, 1945

No. 814

MANHATTAN RAILWAY COMPANY and CHARLES FRANKLIN,
Petitioners,

vs.

THE CITY OF NEW YORK, THEODORE S. WATSON, and others, as a Committee for 7% Guaranteed Stock of Manhattan Railway Company; HAROLD PALMER, and others, as a Committee for 7% Guaranteed Stock of Manhattan Railway Company, and CHARLES FRANKLIN, and others, as Committee for Modified Stock of Manhattan Railway Company, and CHEMICAL BANK & TRUST COMPANY,
Respondents.

BRIEF OF THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

February 14, 1946.

JOHN J. BENNETT,
Corporation Counsel,
Solicitor for Respondent,
The City of New York.

LEO BROWN,
BENJAMIN OFFNER,
of Counsel.

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Respondents.

BRIEF OF THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Petitioner Charles Franklin, as attorney for Manhattan Railway Company (hereinafter called "Manhattan"), seeks review of an order of the Circuit Court of Appeals, Second Circuit, which affirmed an order of the District Court dismissing his petition for an additional allowance in the Interborough-Manhattan receivership proceeding (R. 98, 106). The Circuit Court wrote an opinion (R. 105) as did the District Judge (R. 95-97).

Mr. Franklin received allowances totalling $92,500, exclusive of disbursements, in the receivership proceeding. Upon a previous application, in which he sought an additional allowance of $325,000, he was awarded $15,000. The award was affirmed by the Circuit Court of Appeals and Mr. Franklin's petition for certiorari was denied by this Court, *Franklin* v. *City of New York,* 144 F. (2d) 571 (1944), cert. den. 324 U. S. 847 (1945). Here, Mr. Franklin sought an additional allowance of $310,000 (the difference between the amount he requested and the amount allowed on the prior application), payable either out of the funds reserved for Manhattan Stock under the Interborough-Manhattan Unification Plan, or out of the receivership estate, *i. e.,* by the City of New York (R. 30-31).

Summary Statement of Facts

(1)

The history of the Interborough-Manhattan receivership proceeding, the nature of the legal relations among Interborough, Manhattan, their respective security holders and the City of New York, and the principles governing allowances to attorneys in the proceeding, including Mr. Franklin, are set forth in *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.,* 98 F. (2d) 72 (1938); *Manhattan Railway Co.* v. *Central Hanover Bank & Trust Co.,* 99 F. (2d) 789 (1938), cert. den. 306 U. S. 641 (1939); *Murray* v. *Roberts,* 103 F. (2d) 889 (1939); *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.,* 122 F. (2d) 454 (1941), cert. den. *sub nom Manheim* v. *Merle-Smith,* 315 U. S. 801 (1942); *Palmer* v. *Watson,* 122 F. (2d) 598 (1941); *Franklin* v. *City of New York, supra,* 144 F. (2d) 571, cert. den. 324 U. S. 847, and in the interest of brevity will not be restated here.

(2)

In the receivership proceeding the Manhattan Receiver and the Trustee of the Manhattan Consolidated 4% Mortgage were represented by separate counsel from the outset (Record on Appeal, *Franklin* v. *City of New York, supra,* 144 F. (2d) 571, cert. den. 324 U. S. 847, fol. 6639).* The Manhattan Consolidated 4% Bondholders' (Merle-Smith) Committee, the Palmer Committee for Manhattan 7% Stock, and the Trustee of the Manhattan Second Mortgage all intervened early in the proceeding and each was represented by counsel (*ibid.*, fols. 6639-6640). All of these received allowances (*ibid.*, fols. 349-360, 482-483). On November 11, 1932, Mr. Franklin was elected Manhattan's general counsel, and on January 30, 1933, he became its solicitor. He also served as counsel to the Manhattan 5% Stockholders' Committee until 1938, and from then on as co-counsel (*ibid.*, fols. 362, 366, 6640; see also, *Franklin* v. *City of New York, supra,* 144 F. [2d], at p. 572).

Mr. Franklin received allowances approved by Judge Mack, payable out of the receivership estate, for his services in connection with keeping the Manhattan corporate organization alive, aggregating $22,500 (Franklin Record, fols. 6619, 6708-6710). Judge Patterson made an allowance of $70,000 to Mr. Franklin and his co-counsel for services rendered on behalf of the Manhattan 5% Stock Committee, of which Mr. Franklin received $35,000 (*ibid.*, fol. 3025). This allowance was paid out of amounts allocated to the Manhattan 5% stockholders under Art. Six, par. (6), of the Interborough-Manhattan Unification Plan (*ibid.*, fols. 6750-51, 6758-59; *Franklin* v. *City of New York, supra,* 144 F. [2d], at p. 572).

Thereafter, Judge Patterson allowed Mr. Franklin $20,000 in full for his services in the receivership cause, payable out of the receivership estate, pursuant to Art.

* This record on appeal is part of the instant record (R. 101), and will hereinafter be referred to as the "Franklin Record".

Six, par. (8) (d), of the Unification Plan (Franklin Record, fols. 335, 356, 358-59, 6759-62; *Franklin* v. *City of New York, supra,* at pp. 572-73). On an appeal taken by Mr. Franklin from this order this allowance was increased to $35,000 (*Franklin* v. *City of New York, supra,* at p. 574). Thus, Mr. Franklin has received allowances totalling $92,500 under the Unification Plan.

The Pleadings

1. The Petition.

The petition purported to state three causes in equity. The claim for an additional allowance is based upon the very same services for which Mr. Franklin has already been compensated and which were before the Courts in his prior applications.

In the first cause Mr. Franklin sought to have the District Court adjudge that he have a first lien in the amount of $310,000 upon the funds reserved under the Unification Plan to the Manhattan 5% and 7% Stock, as compensation for his services alleged to have been rendered on behalf of Manhattan and its stockholders; or, in the alternative, that the Court determine the reasonable value of those services and declare a lien on the reserve funds in the amount so determined (R. 4-20).

In the second cause a similar lien was sought against the unmortgaged real estate and other assets formerly belonging to Manhattan and conveyed to the City of New York pursuant to the Unification Plan, including the so-called Retained Assets which were distributable under the Plan as part of the estate (R. 20-22). The first and second causes are identical as to the services for which compensation is sought and in the amount claimed; they differ only with respect to the funds and property against which the liens are to be enforced.

In the third cause the District Court was asked to reform the Unification Plan so that it should contain provisions

by which Mr. Franklin's alleged contracts with Manhattan for his compensation for legal services should be assumed by the City of New York or be paid out of the amounts allocated to Manhattan stockholders under the Unification Plan. The right to the relief was alleged to be "upon the ground that due to mistake and unskillful draftsmanship, inadequate and inappropriate language was used in said Plan * * * contrary to and in violation of the agreement of the parties in interest" (R. 22).

2. The City's Motion.

The City moved to dismiss the petition upon the grounds (1) that it failed to set forth facts sufficient to entitle Mr. Franklin to the relief sought, and (2) that existing decrees rendered on the merits and determining the same issues barred the granting of the relief sought in the petition (R. 80-81).

3. Answer of Manhattan 7% Stock Committee.

The Manhattan 7% Stockholders' (Watson) Committee filed an answer in opposition to the petition. It set forth the orders and decrees of the District Court and the Circuit Court fixing Mr. Franklin's allowances, and alleged that these orders and decrees were *res judicata* as to the relief sought by Mr. Franklin against the reserve funds (R. 41-45).

Apparently Mr. Franklin has completely abandoned the second and third causes in equity. For he has not assigned error to the Circuit Court's affirmance of the dismissal of his petition as to these causes (see Petition for Writ, pp. 7, 8-9). This is also apparent from his brief in support of the petition for a writ (see pp. 10-12). He seeks to have this Court review only the dismissal of the first cause in which he sought an additional allowance chargeable to the funds allocated to Manhattan stockholders.

ARGUMENT

Allowances to Mr. Franklin were governed by the Unification Plan, under which all allowances to counsel were to be fixed by the District Court. The Circuit Court correctly held that the allowances made to Mr. Franklin constitute a final determination of the compensation to which he was entitled and bar him from obtaining any further allowance.

(a)

Allowances to attorneys in the Interborough-Manhattan receivership proceeding were governed by the provisions of the Unification Plan. As the Court pointed out in *Franklin* v. *City of New York, supra,* 144 F. (2d), at page 573, though the Plan provides in Art. Six, par. (3), that the City shall assume Manhattan's obligations under "Existing Agreements", this latter term is defined in definition (12) as excluding "contracts or agreements relating to the employment of counsel". Moreover, Art. Six, par. (5) (d), provides that the City will not assume and pay

> "Any legal * * * expenses or compensation of * * * the Manhattan Railway Company, other than any allowance which may be made by the District Court pursuant to the provisions of subdivision (d) of paragraph (8) of this Article."

Art. Six, par. (8) (d), provides for compensation for services rendered to, and to be paid from, the receivership estate. The portion of the paragraph specifically referring to Mr. Franklin provides that the City will pay:

> "* * * allowances, *if any, which may be made by the District Court* to the solicitor and general counsel of the Manhattan Railway Company for his services and disbursements in the receivership and related proceedings * * *." (Italics ours.)

Art. Six, par. (6), also contains provision for compensation to Manhattan for its legal expenses, to be paid from funds allocated under the Plan to Manhattan stockholders. The applicable portion of the paragraph provides:

> "The legal, accounting, engineering and other expenses and compensation of the Manhattan Railway Company (except as otherwise provided in subdivision (d) of paragraph (8) of this Article with respect to the solicitor and general counsel of the Manhattan Railway Company), *whether heretofore or hereafter agreed to be paid or whether heretofore or hereafter incurred* in the receivership proceedings or in securing assents to the Plan or in the negotiation and consummation of the Plan or otherwise, *all subject to the approval of the District Court,* shall be paid out of the Corporate Stock allocable under Article Four of the Plan to the Guaranteed 7% Stock and the Modified Guaranteed 5% Stock of the Manhattan Railway Company in the proportions determined by the District Court." (Italics ours.)

These are all of the provisions of the Unification Plan which controlled the allowances made to appellant.

Mr. Franklin himself recognized that his right to compensation was governed by these provisions of the Unification Plan. For his applications for allowances were based upon them, as were the allowances which were made by the District Court. The Circuit Court pointed that out in its opinion (144 F. [2d], at pp. 572-73). Despite these adjudications Mr. Franklin now seeks to obtain an additional allowance based on alleged contracts with Manhattan, and attempted to impose this charge either upon the City or upon the funds reserved for Manhattan stockholders. This is nothing more than a reargument of the very position which he took in the prior appeal. In its decision in that case the Circuit Court definitively disposed of Mr. Franklin's rights against the City and the Manhattan stockholders.

Referring to the pertinent provisions of the Unification Plan, that Court said with respect to the City's liability (144 F. [2d], at p. 574):

> "In our opinion these provisions plainly indicate that the City was not to assume Manhattan's contracts for legal expenses but agreed only to pay 'allowances, if any which may be made by the District Court'; and that such allowances must be made in accordance with the principle which controls the allowance of counsel fees in receivership cases, namely, benefit to the receivership estate."

As to the Manhattan stockholders, the Circuit Court held that they could not be charged with liability for these services and that Mr. Franklin could not obtain an allowance for them under Art. Six, par. (6), of the Unification Plan. The Court said (144 F. [2d], at p. 574):

> "This [Art. Six, par. (6)] does not mean that Manhattan's contracts for legal fees are to be enforced against its stockholders. As this court held with respect to similar language in Article Six relating to the legal expenses of Contracting and Assenting Committees, the amount of the allowance must turn upon 'what was done that was beneficial and what that was worth'. Palmer v. Watson, 2 Cir., 122 F. 2d 598, 600. If Manhattan had assets of its own, the case upon which counsel heavily relies, In re Hollis Lumber Co., 2 Cir., 55 F. 2d 898, would be applicable, but here the funds sought to be charged belong to the stockholders as such; they do not take them by distribution of corporation assets. Hence if Mr. Franklin were entitled to be paid anything under paragraph (6) he would be limited to the amount of benefit his services not otherwise compensated had conferred upon Manhattan stockholders. But it seems to us clear that he can take nothing under paragraph (6)."

This Court denied certiorari (324 U. S. 847).

(b)

There is nothing in §§ 474 and 475 of the Judiciary Law of New York to justify a reconsideration of Mr. Franklin's allowances.

Section 474 provides that the compensation of an attorney is governed by agreement. Here, the agreement is in the Unification Plan.

Section 475 of the Judiciary Law provides as follows:

> "From the commencement of an action, special or other proceeding in any court or before any state or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien."

This statute is not applicable here for the following reasons:

1. Manhattan was not a plaintiff and asserted no cause of action in the receivership proceeding.

2. It was not a defendant whose answer contained a counterclaim.

3. There are no funds or assets belonging to Manhattan (with which the contracts were allegedly made) upon which a lien may be asserted. As the Circuit Court said in *Franklin* v. *City of New York*, *supra* (144 F. [2d], at p. 574):

> "* * * here the funds sought to be charged belong to the stockholders as such; they do not take them by distribution of corporation assets."

See, also, *American Brake Shoe and Foundry Co.* v. *Interborough Rapid Transit Co., supra,* 122 F. (2d) 454, cert. den. *sub nom. Manheim* v. *Merle-Smith,* 315 U. S. 801; *Palmer* v. *Watson, supra,* 122 F. (2d), at p. 600.

4. Neither in his first cause (wherein he seeks to enforce a lien against the funds reserved to Manhattan stockholders) nor in his second cause (wherein he seeks to enforce a lien against property owned by the City) does Mr. Franklin seek to charge a party with whom he had an agreement for compensation.

5. The last sentence of the statute, providing for a determination by the Court of the amount of the lien, is precisely what was done by the District and Circuit Courts, in determining what allowances were to be made to Mr. Franklin and out of which funds, established by the Plan, they were payable.

6. Finally, the Circuit Court has correctly disposed of this contention in saying (R. 105):

> "Legal fees in the receivership are governed not by any general equitable principles, but by the Plan itself; and our earlier interpretation of its terms is final. The claims themselves being barred, the assertion of a lien as security for their collection must obviously fail."

(c)

Realizing that the provisions of the Unification Plan and the allowances made to him constitute a complete bar to his obtaining an additional allowance, Mr. Franklin attempted, in the third cause of his petition, to obtain a reformation of the Plan in such a way as to accomplish what the Courts have thus far denied him. He asked the Court to reform the Plan so that the City or the Manhattan stockholders be obliged to pay him the unpaid balance claimed to be due under his alleged contracts with Manhattan, amounting to $310,000 (R. 22-30; see also R. 57-58).

The Circuit Court held that Mr. Franklin had failed to make out a case for reformation (R. 105). Mr. Franklin has not assigned error in this holding and seeks no review of it here. Consequently further discussion of this issue is unnecessary.

CONCLUSION

Petitioner has no meritorious complaint. He has received allowances aggregating $92,500 in the proceeding. Three separate District Judges passed on those allowances, a Special Master heard voluminous testimony, the Circuit Court has twice carefully reviewed the whole record, and this Court denied certiorari. After such careful consideration no further review by this Court is warranted.

The petition for a writ of certiorari should be denied.

February 14, 1946.

Respectfully submitted,

JOHN J. BENNETT,
Corporation Counsel,
Solicitor for Respondent,
The City of New York.

LEO BROWN,
BENJAMIN OFFNER,
of Counsel.

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FEB 21

Supreme Court of the United States

OCTOBER TERM, 1945

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Respondents.

PETITIONERS' REPLY BRIEF

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of Counsel.

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PETITIONERS' REPLY BRIEF

I

Misleading statements in opposing brief.

The statements (pp. 2, 11), that petitioner Franklin received $92,500 are misleading and refuted by the record. The fact is, that he has had no compensation whatever for the services in question over the eight year period. The transcript of record before this Court shows that counsel for the City of New York stipulated the correctness of the following fact:

> "that allowances heretofore made do not meet petitioner's out-of-pocket office overhead expense incurred in the performance of the labors, leaving nothing for the work" (fol. 2).

The agreed statement of fact above quoted is in accord with the averments of the petition (fols. 38, 264-5). Total

allowance to petitioner under the Plan was $35,000, and not $92,500. This fact also appears in the agreed statement of the case (fol. 7).

These averments of the petition (fols. 38, 264-5) have never been questioned or denied. They were established by exhibit and testimony in the former abortive proceeding, the District Court having declared therein that said Exhibit 124 "was in no way impugned" (Certiorari rec., fols. 7294, 1940, 324 U. S. 847).

Petitioner Franklin's disbursements in the rendition of the services totaled $76,959.46, and were never repaid. Actually, petitioner not only has had no compensation for his labors in question, but he has sustained a deficit in excess of $6,000.

The payment of $22,500 (p. 2) was not made to petitioner Franklin, but to junior attorneys engaged on Manhattan Company corporate work, as to which the District Court declared that payment was ordered because such work properly belonged to the Receiver (Cert. rec., fols. 108-9, 105).

Contrary to the statement (p. 3), that allowance was made of $70,000 to Mr. Franklin and his co-counsel for services to the 5% Committee of which he received $35,000, the fact is that he did not receive such amount, and further the said Committee's petition by its terms expressly excluded Mr. Franklin's services in question.* Moreover,

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* Paragraph Second of the Modified Stock Petition alleged as follows (R. fols. 4609-10):

> "SECOND: This petition is *not* intended to cover the services of Manhattan's general counsel and solicitor in the receivership and related proceedings; such service under the provisions of subdivision (d), paragraph (8) of Article Six of the Plan of Unification will be the subject of a separate petition to be filed on or before May 15, 1940, in pursuance of the order of this court dated April 16, 1940."

Further, paragraph Seventh, provided as follows (R. fol. 4624):

> "Compensation to counsel. *No sums are asked in this petition as compensation to counsel for Manhattan.*"

the order of the Court granting the allowance to Messrs. Hodges, Reavis, Pantaleoni & Downey, the solicitors for said Committee who had made the application, specifically excluded from its scope: "the fees of counsel for Manhattan Railway Company (that is, petitioner Franklin) in the receivership and related proceedings, being the subject of a different petition" (Cert. rec., fol. 4802).

II

The true application of *Palmer* v. *Watson* (122 Fed. 2nd 589 [C. C. A. 2nd] to petitioners' position.

Franklin v. *City of New York* (144 Fed. 2nd 571; cert. den. 324 U. S. 847), is quoted at page 8 of the opposing brief as authority that the obligation of Manhattan Stockholders to petitioner Franklin cannot be enforced against them. The quotation rests upon the statement of said Court in *Palmer* v. *Watson* (122 Fed. 2nd 598 [C. C. A. 2nd] 600).

Palmer v. *Watson* decided what the Palmer Committee and counsel could take under Article Six, paragraph (6) of the Unification Plan against all Manhattan Guaranteed Stockholders. They could only take what they were awarded by the District Court as the value of their services. But the opinion of the Circuit Court of Appeals concluded with this express reservation (p. 600):

> "We do not in affirming this order attempt to decide what may be the obligations of its actual depositors to the Committee."

It will not be disputed that thereafter, upon the petition of the solicitor for the Palmer Committee, the District Court enforced the contract for legal compensation against the depositing stockholders with said Committee and directed payment out of the reserves with Chemical Bank

& Trust Company mentioned in the present petition (fol. 11). Now we have the precise parallel. Manhattan stockholders through their company obligated themselves to pay petitioner Franklin a minimum of $250,000 out of the funds which they might receive "from or in respect to claims and rights of the Interborough Rapid Transit Company or its Receiver or the City of New York" (fols. 101, 103). It is $235,000 of that agreed compensation, plus $75,000 unpaid balance of salary due as general counsel that the petition herein asks to be paid Mr. Franklin from the fund recovered on the claims of Manhattan stockholders as creditors against Interborough Rapid Transit Company now reserved for them (fol. 19).

III

The City of New York, as the sole objector, is without standing to oppose petition for certiorari.

No relief is asked against the City of New York. It has really no interest in the present proceeding, which is directed not against its treasury but against reserve funds *in custodia legis,* out of which not one penny has been contributed for the services involved in this proceeding. The City comes forward as a self appointed guardian, whereas the petition and papers before the courts below show that the protective committees for Manhattan stockholders filed no objection, but approved of payment, even the Watson 7% Committee for Manhattan Guaranteed stock, in spite of the answer of *res adjudicata* interposed by its solicitors (fols. 50, 51, 155, 198, 199, 200, 224, 225), and as recognized by the District Court (fol. 296).

CONCLUSIONS

The opposing brief is an evasion of the petition and supporting brief.

The petition for writ of certiorari should be granted.

Dated, New York, February 18, 1946.

Respectfully submitted,

JOHN B. DOYLE,
Counsel for Manhattan Railway Company and Charles Franklin, Petitioners.

FREDERIC A. JOHNSON,
of Counsel.